MOHD. ROSLE YUSOF

v.

LYE KIM HEE

HIGH COURT MALAYA, PENANG
WAN ADNAN J
[CIVIL SUIT NO. 25-416-85]
27 MARCH 1990

TORT: *Conflicting versions of accident - Travelling in same direction - Whether chemist an expert - Paint sample collected - Inference - Contributory negligence - Width of road - No evasive action by plaintiffs - Inference of speeding.*

The plaintiff rider of motorcycle M1 and the defendant rider of motorcycle M2 were involved in an accident at about 19¼ milestone Sg. Bakap/Wellesley Rd. A head on collision occurred between the 2 motorcycles as one of them was overtaking a van. Both parties claimed that they were travelling from Sg. Bakap to Wellesley.

The quantum of damages had been agreed to and the issue here was that of liability. Reliance was placed on the testimony of a chemist C who was attached to the Jabatan Kimia. C stated in his testimony that:

(i) the damage to the van was at its front off-side.

(ii) he found some bluish paint flashes on the off-side end of the bumper of the van.

(iii) he collected foreign blue paint found on M1.

(iv) he did not find any foreign paint smear on M2. After comparison, C also found that the paint found on M1 was similar in colour, texture and layering with the paint of the van.

C was therefore of the opinion that the van had come into contact with M1 but he was however unable to determine their most probable relative positions at the time of impact. C also stated that as there was no foreign paint on M2, he was unable to ascertain whether it had come into contact with the van and M1.

PW3, a witness testified that he saw the plaintiff travelling from the direction of Sg. Bakap.

Held:

[1] C only testified that he was a Government Chemist attached to the Chemistry Department in Petaling Jaya but he had not shown to the Court that he had special knowledge and experience on the subject matter in which he was giving the opinion; he had not even stated his academic qualifications. C therefore did not have any special knowledge or experience on the subject matter on which he was giving the opinion, therefore he was not an expert upon whose opinion the Court can rely.

[2] Therefore, the Court only accepted his evidence of the fact that there was contact between the van and M1. This finding however did not conclusively mean that there was no contact between the van and M2.

[3] There was no evidence of contract between the van and the defendant's motorcycle because there was no evidence of any paint transfer between the two vehicles. Contact could however have taken place.

[4] As the testimony of PW3 supported the plaintiff's story and the defendant's testimony was uncertain, on a balance of probabilities it was more probable that it was the plaintiff who was proceeding from Sg. Bakap towards Wellesley and that it was the defendant was travelling in the opposite direction.

[5] As the road was a straight road and as there was no evidence at the speed at which either party was travelling, and taking into account the fact that the collision had occurred after the overtaking of the van, the plaintiff had failed to take steps to avoid the collision, as he must have been travelling fast as the width of the road would have allowed him to take evasive action. If he had slowed down and swerved to the left when he flashed his lights to warn the defendant, the collision could have been avoided.

[6] If the plaintiff and the defendant were to be driving vehicles other than motorcycles the defendant would have been wholly responsible for the collision.

[Both parties equally liable.]

For the plaintiff - V. Sithambaram and Venugopalan Nair; M/s. Kumar, Sitham & Co.
For the defendant - Ng Chee Kong; M/s. Ng Chee Kong & Co.

[**Editor's Note:** The following case was heard together at this High Court sitting: *Lim Liang Hock v. Mohd. Rosle bin Yusof* (Civil Suit No. 25-52-88)]

JUDGMENT

Wan Adnan J:

These two cases were heard together. They arose out of the same accident involving two motorcycles. The plaintiff in Civil Suit No. 25-416-85 was the rider of the motorcycle no. PAH 7407 and the plaintiff in Civil Suit No. 25-52-88 was the rider of motorcycle no. PAS 1939. In this judgment the plaintiff in Civil Suit No. 25-416-85 (Mohd. Rosle bin Yusof) will be described as the plaintiff and the plaintiff in Civil Suit No. 25-52-88 (Lim Liang Hock) will be described as the defendant. Quantum of damages on 100% liability had been agreed to.

The accident occurred at about 19¼ milestone Sg. Bakap/Wellesley Road on 15 November 1984 at about 6.30 p.m. One motorcycle was proceeding from Sg. Bakap towards Wellesley. The other was proceeding in the opposite direction. There was one van proceeding from Wellesley towards Sg. Bakap. A head-on collision occurred between the two motorcycles as one of them was overtaking the van.

The plaintiff said he was proceeding from Sg. Bakap towards Wellesley. It was the defendant who was coming from the opposite direction overtaking the van and colliding into him. On the other hand the defendant said he was the one proceeding from Sg. Bakap towards Wellesley and that it was the plaintiff who was coming from the opposite direction overtaking the van and colliding into him. Both could not be telling the truth.

The plaintiff said that while proceeding from Sg. Bakap towards Wellesley he saw a van coming from the opposite direction. A motorcycle also from the opposite direction overtook the van and collided into him head-on. He fell and became unconscious. The road was slippery at that time. He had his lights on but the oncoming motorcycle did not have the lights on. The motorcycle encroached into his path. He flashed his headlight to warn the rider of the motorcycle not to overtake the van.

Earlier before reaching the 19¼ milestone he had met his uncle Mustaffa bin Yahya (PW3) coming from the opposite direction riding a motorcycle. They waved at each other. This Mustaffa in his evidence confirmed that on 15 November 1984 at about 6.30 p.m. he was proceeding from Wellesley to Sg. Bakap. He met the plaintiff coming from his opposite direction.

The defendant said that on 15 November 1984 at about 6 p.m. he was proceeding towards Wellesley. He was riding motorcycle PAS 1939. He left his house at Kg. Jawi and went to Sg. Bakap before proceeding to Wellesley. He saw a van coming from the opposite direction about 100 feet away. When he was about 70 feet away he saw a motorcycle coming from behind the van and overtaking it. He flashed his light but the motorcycle continued with the overtaking. There was a collision.

DW1 Chan Kee Bian is a chemist attached to Jabatan Kimia, Petaling Jaya. He said that on 17 November 1984 he was requested by the police to examine the damage to three vehicles. The damage to the van was at its front off-side as in photo 1. He found some bluish paint flakes on the off-side end of the bumper of the van. He collected foreign blue paint found on the motorcycle PAH 7407 (the plaintiff's motorcycle). On motorcycle PAS 1939 (the defendant's motorcycle) he did not find any foreign paint smear. He then compared the paint found on the motorcycle PAH 7407 with the specimen paint of the van. He found them to be similar both in colour texture and layering. He was therefore of the opinion that the van had come into contact with the motorcycle PAH 7407. However he was unable to determine their most probable relative positions at the time of impact. He also said that since there was no foreign paint on PAS 1939 he was unable to ascertain if it had come into contact with the van and the motorcycle PAH 7407. He further said that from the evidence he was of the opinion that the front off-side of the van had come into collision with the left side of the motorcycle PAH 7407 and from the damage on the motorcycle PAH 7407 and the van it was possible that the motorcycle had approached the van from the rear of the van.

It is the function of the Court to form its own conclusion on the facts stated. In cases in which the Court is not in a position to form a correct conclusion or opinion the Court may obtain help from persons who have acquired special skill and experience on the particular subject. But before the opinion of such person can be accepted it must be shown to the Court that that person has a special knowledge about the particular subject. A bare expression of opinion has no evidential value.

PW1 only testified that he was a Government Chemist attached to Chemistry Department Petaling Jaya. He had not shown to the Court that he had special knowledge and experience on the subject matter in which he was giving the opinion. He had not even stated his academic qualifications. In the circumstances he is not an expert upon whose opinion the Court can rely. But the fact that he is a chemist is not disputed. I would therefore only accept his evidence of the fact that he collected foreign blue paint on the motorcycle PAH 7407, compared the paint with the specimen paint of the van and found them to be similar in colour, texture and layering. On this fact I find that there was contact between the van and the motorcycle PAH 7407. This finding does not however mean that there was also a finding that there was no contact between the van and the motorcycle PAS 1939.

The most important finding that I had to make was the direction the parties were proceeding before the accident. PW3 supported the plaintiff's story that he was proceeding from Sg. Bakap towards Wellesley. The fact that PW3 is the plaintiff's uncle is no ground to disbelieve him.

The defendant in cross-examination said that his house was between Sg. Bakap and Wellesley and to go to Wellesley from his house he did not have to go to Sg. Bakap. He could go to Wellesley by another road. But he said the road was deserted and that his usual route to Wellesley was *via* Sg. Bakap. At first in examination-in-chief he said he was going *via* Sg. Bakap first to look for a friend. But later during cross-examination he said he just tried to see whether he could see a friend while passing through the town.

The evidence of the van driver PW2 was no help.

I must admit that with the evidence before me it was not easy to come to a finding. It could be true that the plaintiff was proceeding from Sg. Bakap to Wellesley. It could also be true that the defendant was proceeding in that direction. I had to decide on the balance of probabilities. Having considered all the evidence I came to the conclusion that it was more probable that it was the plaintiff who was proceeding from Sg. Bakap towards Wellesley and that the defendant was proceeding in the opposite direction.

I must now consider whether there could be a case of contributory negligence.

The plaintiff was proceeding from Sg. Bakap towards Wellesley. Coming from the opposite direction was a van. The defendant overtook the van. There was a head-on collision between the two motorcycles. There was also contact between the plaintiff's motorcycle and the van. Their relative positions at the time of contact could not be ascertained. There was no evidence of contact between the van and the defendant's motorcycle because there was no evidence of any paint transfer between the two vehicles. Contact could however have taken place.

The road was a straight road. The width of the road together with the sidetables was 8.7 meters. The plaintiff did not say at what speed he was travelling. The defendant also did not say his speed. There was evidence that plaintiff flashed his lights to warn the defendant not to overtake. But he did not say that he slowed down or swerved his motorcycle. He also said that the collision took place after the overtaking of the van.

In the circumstances of the case I find that the plaintiff had failed to take steps to avoid the collision. He must have been driving very fast. The impact was after the overtaking of the van. If he had slowed down and swerved to the left when he flashed his lights to warn the defendant the collision could have been avoided. I found that both were equally liable for the collision and awarded the damages accordingly. If the plaintiff and the defendant were to be driving vehicles other than motorcycles I would have held the defendant to be wholly responsible for the collision.

Also found at [1991] 3 CLJ 2177